No. 401

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

DISTRICT OF COLUMBIA, *Petitioner,*

v.

BANK OF COMMERCE AND SAVINGS,
THE SECURITY SAVINGS AND COMMERCIAL BANK,
THE CITY BANK OF WASHINGTON,
McLACHLEN BANKING CORPORATION,
ANACOSTIA NATIONAL BANK OF WASHINGTON,
INDUSTRIAL BANK OF WASHINGTON, INC.,
THE CITIZENS' BANK OF WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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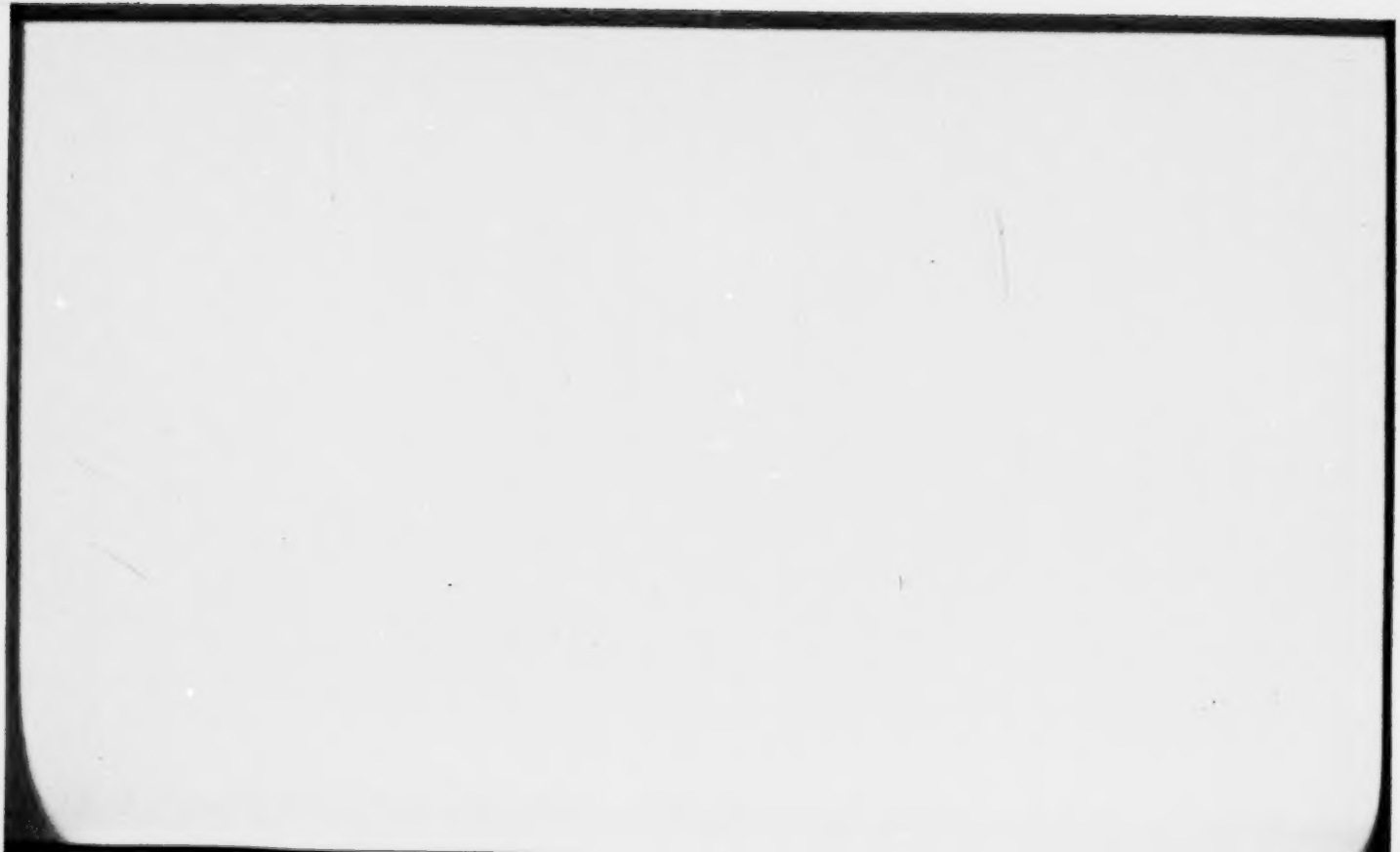

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the District of Columbia, a municipal corporation, respectfully shows and represents unto your Honors that:

STATEMENT OF THE MATTER INVOLVED.

All of the statutes involved in these proceedings were enacted by the Federal Congress in the exercise of its ex-

clusive power to legislate for the District of Columbia under Art. I, Sec. 8, Cl. 17, of the Federal Constitution.

An act of Congress of July 1, 1902 (codified as Sec. 47-1701, D. C. Code, 1940, and hereinafter referred to as "Sec. 1701"),[1] which was enacted by the Congress in 1902, imposes a tax of 6% upon the gross earnings of "Each national bank * * * and all other incorporated banks and trust companies in the District of Columbia." Another portion of the 1902 statute provided for a different method of taxing "Savings banks having no capital stock and paying interest to their depositors", which is now codified as the first paragraph of Sec. 47-1703, D. C. Code, 1940.[2]

By an Act of April 28, 1904,[3] Congress added to the District bank tax statutes what is now the second paragraph of Sec. 47-1703, D. C. Code, 1940 (hereinafter referred to as "Sec. 1703"). It provides that "Incorporated savings banks paying interest to their depositors" shall pay upon their gross earnings, less the sums paid as interest to their depositors, an annual tax of 4%. In the words of the Court below, this Amendment "had the obvious effect of giving to 'incorporated savings banks paying interest to their depositors' more favorable tax treatment than that which § 1701 gives to 'each national bank and all other incorporated banks and trust companies' " (R. 478).

The several banks of the District of Columbia include not only national banks but other banks incorporated under the laws of the District of Columbia or of one of the States, which are hereinafter referred to as "non-national banks". These other banks are the seven respondents to this petition. Each of the non-national banks conducts, as do national banks, a commercial banking business and also has, as have national banks, substantial savings deposits upon which it pays interest. Both national and non-national

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[1] See p. 14, *infra*.
[2] See p. 15, *infra*.
[3] 33 Stat. 564, ch. 1815. See p. 15, *infra*.

banks in the District of Columbia are under the regulatory control of the Comptroller of the Currency. For many tax years prior to the tax year here involved, the taxing authorities of the District classified the non-national banks as "incorporated savings banks paying interest to their depositors" under the second paragraph of Sec. 1703, and collected taxes from them at the rate therein prescribed. For many tax years prior to and including the tax year here involved, the taxing authorities have classified national banks in the District for taxation under Sec. 1701, and assessed taxes against them at the rate therein prescribed. (R. 478.)

Sec. 1701 requires national banks, *inter alia,* in the District of Columbia to file annual reports of gross earnings with the Assessor. Hamilton National Bank (hereinafter referred to as "Hamilton"), filed a report showing its gross earnings. In reporting its taxable earnings Hamilton had deducted from its gross earnings the interest paid by it to depositors on time and savings deposits. On September 1, 1944, the Assessor disallowed the said deduction and presented to Hamilton a bill for taxes on the gross earnings reported plus the deduction disallowed. (R. 478; see also R. 129, *District of Columbia* v. *Hamilton National Bank,* No. 385, October Term, 1949.)

Hamilton paid the tax under protest in writing and thereafter seasonably filed its petition with the Board of Tax Appeals for the District of Columbia (hereinafter referred to as the "Board") for a reduction of the amount of the assessment by such amount as represented the additional taxes upon the ground that the Assessor had erred in refusing to allow it to deduct from its gross earnings the interest paid during the year to its savings depositors (p. 22, *infra*). At the hearing Hamilton introduced evidence proving that certain incorporated non-national banks, some of the respondents herein, which carried on a savings and commercial banking business in the District

of Columbia similar to that done by Hamilton, had been permitted by the Assessor to deduct interest paid depositors on time and savings deposits in computing their gross earnings for tax purposes. (p. 25, *infra*).

The Board held that Hamilton could not deduct the interest paid by it on time and savings deposits from its gross earnings for tax purposes under Sec. 1701 (p. 23, *infra*).

Hamilton filed a petition for review by the United States Court of Appeals for the District of Columbia Circuit of the decision of the Board (p. 22, *infra*).

On appeal,[4] Hamilton made three contentions (p. 22, *infra*). The Court rejected the first and third contentions of Hamilton (pp. 23, 29, *infra*). Hamilton's *first contention* was that interest paid its depositors on savings accounts is deductible in computing gross earnings for tax purposes. In rejecting this contention, the Court said that it agreed with the Board that "this interest falls within the deductions from gross income or gross earnings in the computation of net income, rather than among the eliminations which must be made from gross receipts in order to ascertain income or earnings" (p. 23, *infra*). The *third contention* of Hamilton was that the tax in controversy was a discrimination violative of Sec. 5219 of the Revised Statutes (12 U.S.C.A., Sec. 548). The Court below pointed out that that statute is addressed to the legislatures of the States, and the statutes involved in this case are Acts of the Federal Congress. However, the Court was of opinion that Sec. 5219 was of value in this case as an indication of Congressional policy, and that to that extent Hamilton's *third contention* was sound. (p. 29, *infra*.)

The *second contention* of Hamilton, as stated by the Court of Appeals, was that "the difference in treatment accorded

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[4] The opinion of the Court of Appeals in the first appeal is reproduced as an appendix to this petition and brief for the convenience of this Court (pp. 21-29, *infra*).

by the taxing authorities to national banks and state banks is an illegal discrimination which voids the tax upon" Hamilton (p. 24, *infra*). It was under this second contention of Hamilton that the first appeal was decided by the Court of Appeals.

The Court of Appeals found that discriminations were "presently existing" against Hamilton (p. 29, *infra*). The Court rejected any idea that those discriminations were in the statutes themselves, saying that:

> "* * * It is apparent that the 1904 act was intended to subject incorporated savings banks to a tax different from the tax imposed on other incorporated banks, including national banks. This classification of banks by the Congress for tax purposes rested upon reasonable differentials and was, therefore, valid. * * *" (p. 24, *infra*.)

This being so, the Court then considered the question of discrimination in "administrative action" (p. 25, *infra*).

With reference to the administrative action, the Court said that it did not think that "the simple ascertainment of whether a bank has a national charter or a state charter is a proper method of determining whether the bank is or is not an incorporated savings bank" (p. 24, *infra*). The Court said that the answer to the question of what is a savings bank must be reached "by viewing what was actually done", and that "Legally speaking, the test applied by the administrative authorities in the case at bar is arbitrary" (p. 25, *infra*).[5]

Having found the administrative action to be "arbitrary", the Court said that the next question was "whether

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[5] Presumably, the test which the Court spoke of as being arbitrary was the administrative action in assessing national banks under Sec. 1701 where they are specifically designated, and taxing non-national banks under Sec. 1703 consistently with long administrative interpretation (R. 479, 480). After the decision of the Court of Appeals in the first *Hamilton* case, the administrative authorities taxed the non national banks under Sec. 1701, but that action was set aside by the Board (R. 479).

the administrative action is so improper as to be invalid" (p. 25, *infra*). In discussing this question the Court had occasion to state that:

> "* * * The equal-protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states. The Fifth Amendment, of course, does apply, but it contains no equal-protection clause. The Supreme Court has held as settled that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due-process clause, and has intimated that discrimination, if gross enough, might invalidate an act of Congress as equivalent to confiscation and therefore void under the Fifth Amendment. But we are not considering the validity of an act of Congress and need not go into the question whether Congress itself could provide a differential in tax for savings banks and in the same enactment define a savings bank as a bank with a state charter. * * *" (pp. 25, 26, *infra*.)

In disposing of the case, the Court reversed the decision of the Board and remanded the case with instructions to cancel the assessment against Hamilton unless the tax Assessor, upon a reexamination of the entire subject of taxing banks in the District, removed the discriminations "presently existing", and said that if the tax Assessor did so "the validity of his further proposals may be considered" (p. 29, *infra*).

After remand, the Assessor of the District of Columbia reexamined the entire subject of taxing banks in the District of Columbia and concluded that there is no bank in the District which qualifies as an incorporated savings bank paying interest to its depositors for purposes of classification and taxation under the provisions of the second paragraph of Sec. 1703. He proceeded, accordingly, to tax all banks in the District, both national and non-national,

at the higher rate of taxation provided by Sec. 1701. The banks so assessed, these respondents, constituted all the banks engaged in business in the District during that fiscal year, other than national banks and trust companies. Thereafter the non-national banks appealed to the Board from the additional taxes assessed against them as aforesaid, upon the principal ground that the Assessor had erroneously determined that they were not incorporated savings banks subject to tax under Sec. 1703. Upon appeal to it, the Board held that the appealing non-national banks were properly subject to tax only under Sec. 1703, and accordingly ordered refunds of the amounts assessed as additional taxes under Sec. 1701. From the decisions of the Board in the seven cases of the non-national banks, the District appealed to the Court below. (R. 479.)

Subsequent to the decisions in the cases of the seven non-national banks, the Board considered the case of Hamilton, pursuant to the remand, and concluded, as matters of law, (1) that the discrimination found by the Court of Appeals upon its review in the first case had been removed (R. 480) and (2) that the decision of the Board in the first appeal of Hamilton to it should not be set aside (R. 479). Thereupon Hamilton filed its petition for review of the Board's decision in its case by the Court below (R. 479).

All eight cases (Hamilton and these seven non-national banks) were argued in the Court of Appeals on the same day and were disposed of in a single opinion (R. 477).

The disposition of the cases by the Court below may be summarized by the following quotation from the opinion:

> "So long as the taxing authorities of the District of Columbia classify as 'incorporated savings banks' the state-chartered commercial banking institutions which have interest-bearing savings deposits, and impose upon them the form of taxation set up in § 1703, the national banks in the District which have interest-bearing savings deposits must

> be classified and taxed in the same manner. The order of the Board of Tax Appeals in the Hamilton National Bank case will be set aside." (R. 483.)

From the foregoing quoted portion of the opinion of the Court of Appeals, it might be inferred that the Assessor of the District of Columbia has it within his power to discontinue the classification of the non-national commercial banking institutions as "incorporated savings banks." Such is not the case, however, since the Court held in this opinion that "the Board of Tax Appeals was justified in holding the state-chartered banks to be taxable under § 1703 as incorporated savings banks" (R. 481). It may be significant that the Court used the word "justified" and not the more exact word "correct."

The net effect of the opinion of the Court below may be summarized in the following manner:

> National banks must not be taxed under Sec. 1701, which specifically provides for the taxation of national banks, but must be taxed under Sec. 1703, which provides for the taxation of "savings banks" and of "incorporated savings banks" and does not mention national banks.
>
> Non-national banks which are primarily engaged in a general commercial banking business and also have substantial savings deposits, must not be taxed under Sec. 1701, which specifically provides for the taxation of national banks and of other incorporated banks and trust companies, but must be taxed under Sec. 1703, which provides only for the taxation of "savings banks" and of "incorporated savings banks."

Petitioner's principal complaint with the opinion of the Court of Appeals in these cases is directed to the effect of the opinion on Sec. 1701. The effect of that opinion is to repeal Sec. 1701 by implication insofar as that section imposes a tax at the rate of 6% per annum on the gross earnings of "national banks" and also of "all other incorporated banks."

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered May 31, 1949 (R. 485). The petition for rehearing before the full Court was filed June 14, 1949, and denied July 20, 1949 (R. 493, 494). The jurisdiction of this Court to issue a writ of certiorari in these cases is invoked under Title 28, U.S. Code Sec. 1254 (Act of June 25, 1948, 62 Stat. —, ch. —).

QUESTION PRESENTED.

The question presented is whether incorporated banks engaging in a general commercial banking business in the District of Columbia and having substantial savings deposits upon which they pay interest are subject to tax at the rate of 6% per annum upon their gross earnings as "incorporated banks," or are subject to tax, as the Court of Appeals has held, as "incorporated savings banks" at the rate of 4% per annum upon their gross earnings less the amount paid as interest to their depositors, under statutes enacted by the Federal Congress.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The United States Court of Appeals for the District of Columbia Circuit has decided a question of substance relating to the construction and application of statutes enacted by the Congress, and, as a result of that construction, has decided the application of the Constitution of the United States. These matters have not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia Circuit disposed of these seven cases and the case of *Hamilton National Bank* v. *District of Columbia* in a single opinion. In that opinion, and as the direct result of its decision with respect to these seven cases, that Court

has not given proper effect to the decisions of this Court with respect to the legislative power of the Federal Congress.

This Court has held that the Fifth Amendment to the Federal Constitution contains no equal protection clause and that a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under that Amendment; but the Court below has declared in the opinion in these cases and the case of *Hamilton National Bank* v. *District of Columbia* that the Fifth Amendment as applied to the District of Columbia implies equal protection of the laws, and that inequality in the incidence of a tax imposed by the Federal Congress upon taxpayers engaged in the same type of business renders a statute unconstitutional upon the theory that the statute denies due process and equal protection of the laws under the Fifth Amendment. It is believed that a review by this Court of the decision of the Court of Appeals in these cases is inseparable from a consideration of the decision of that Court in the case of *Hamilton National Bank* v. *District of Columbia,* in which latter case the District Government has applied for a writ of certiorari.[6]

3. The question presented in the case of *Hamilton National Bank* v. *District of Columbia* and these seven cases is applicable not only with respect to determining the constitutionality of the particular statutes involved but also to every statute enacted by the Federal Congress in the exercise of its exclusive jurisdiction to legislate for the District of Columbia.

4. The question is of general importance. The questions presented in these cases and in the case of *Hamilton National Bank* v. *District of Columbia* will affect not only those banks but every bank in the District of Columbia. In the words of the Court below in the first appeal in the *Hamilton* case: "The interests of all the banks are involved."

[6] No. 385, October Term, 1949.

WHEREFORE, your petitioner, the Government of the District of Columbia, prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in these cases, and that said cases may be reviewed and determined by this Court, and that the judgments of said Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

DISTRICT OF COLUMBIA,
Petitioner.

By:

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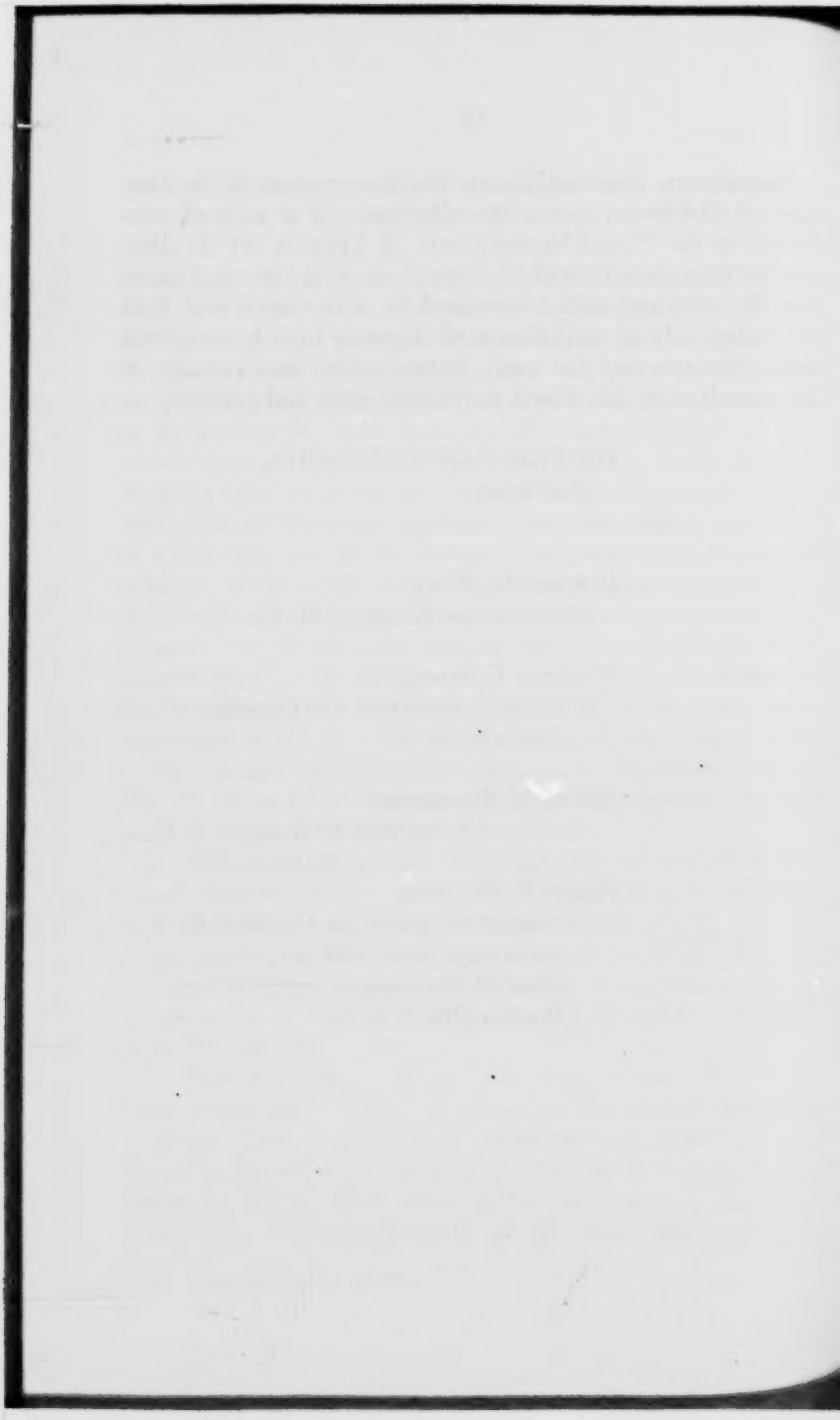
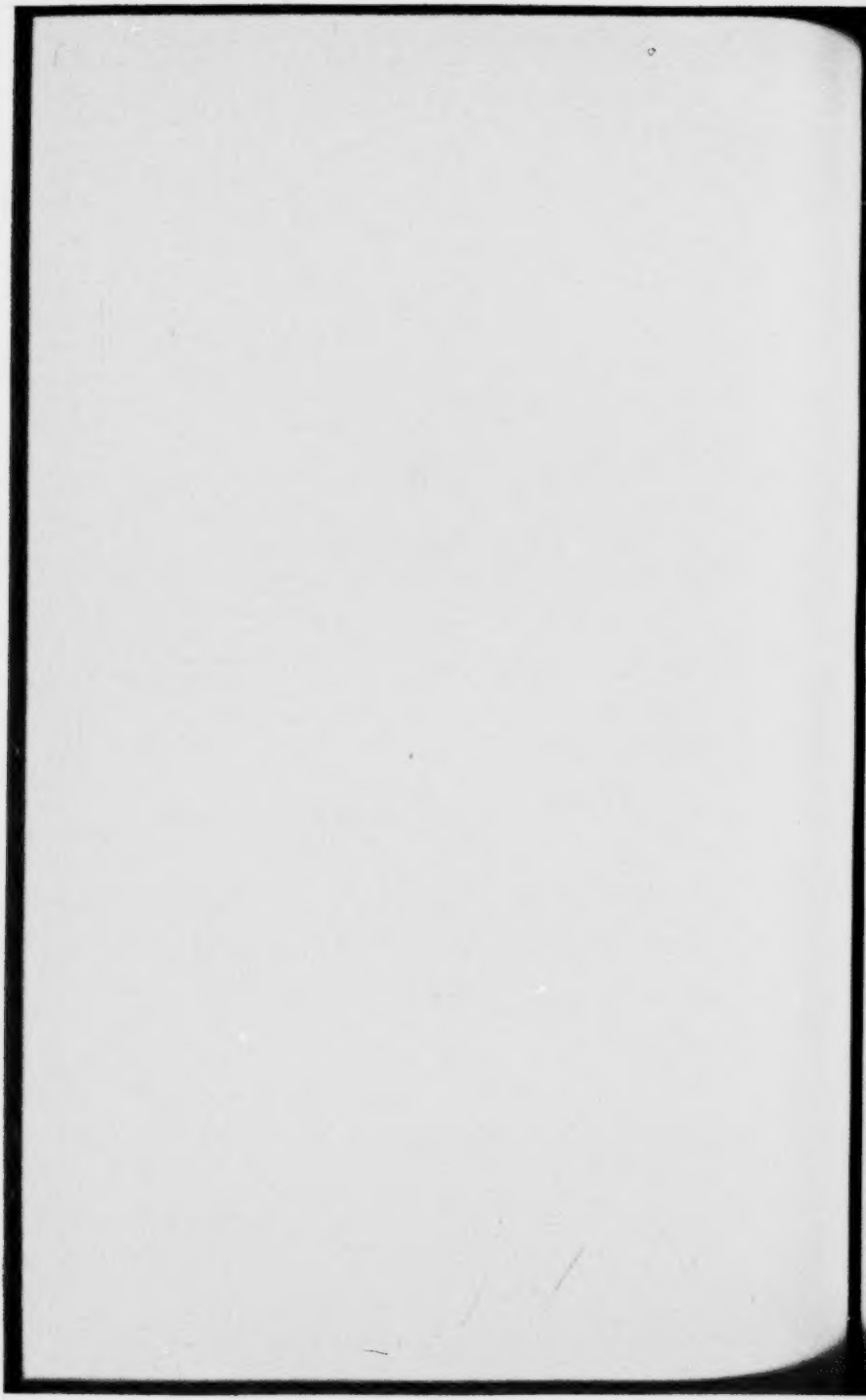


BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.



BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion (R. 476) of the United States Court of Appeals for the District of Columbia Circuit in these cases is not yet reported. The opinion of the Board of Tax Appeals for the District of Columbia (R. 22-27) in these cases is reported in 76 W.L.R. 633.

GROUNDS OF JURISDICTION.

The grounds on which the jurisdiction of this Court is invoked are:

1. The United States Court of Appeals has decided a question of substance relating to the construction and application of the Constitution and a statute enacted by the Congress of the United States which has not been, but should be, settled by this Court.

2. The United States Court of Appeal has not given proper effect to the decisions of this Court applicable to the question decided.

3. The United States Court of Appeals has decided an important question of law involving the Constitution and a statute of the United States applicable to the District of Columbia, which decision is in conflict with its own prior decisions and with the decisions of this Court relating to the power of Congress.

STATEMENT OF THE CASE.

The case is sufficiently stated in the petition (pp. 1-8, *supra*).

Provisions of Constitution and of Statutes Involved.

Art. I, Sec. 8, Cl. 17, of the Constitution provides, insofar as here pertinent, that:

> "The Congress shall have power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *"

The Fifth Amendment to the Constitution provides, insofar as here pertinent, that:

> "No person shall be * * * deprived of life-liberty, or property, without due process of law * * * "

Sec. 6, par. 5, of the Act of July 1, 1902, 32 Stat. 619, ch. 1352, as amended by Title IV, Sec. 2, of the Act of July 26, 1939, 53 Stat. 1107, ch. 367 (which, as amended, appears as Sec. 47-1701, D.C. Code, 1940), provides, insofar as here pertinent, that:

> "Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks and trust companies in the District of Columbia, * * * shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings * * * for the preceding year ending the thirtieth day of June, and each national bank and all other incorporated banks and trust companies respectively shall pay to the collector of taxes of the District of Columbia per annum six per centum on such gross earnings * * * ."

Sec. 6, par. 7, of the Act of July 1, 1902, 32 Stat. 619, ch. 1352, provides that:

> "Savings banks having no capital stock and paying interest to their depositors shall, through their president or cashier, make affidavit to the board of personal-tax appraisers on or before the first day of August in each year as to the amount of their surplus and undivided profits, and shall pay to the collector of taxes of the District of Columbia a sum equal to one and one-half per centum on the amount of their surplus and undivided profits on the thirtieth day of June preceding."

By the Act of April 28, 1904, 33 Stat. 564, ch. 1815, to said paragraph 7, *supra,* was added a new paragraph reading as follows:

> "Incorporated savings banks paying interest to their depositors shall, through their president or cashier, make report under oath to the board of personal tax appraisers on or before the first day of August in each year as to the amount of their gross earnings, less the amount paid as interest to their depositors for the preceding year ending June thirtieth and shall pay thereon to the collector of taxes of the District of Columbia four per centum per annum."

As amended, said paragraph 7 is codified as Sec. 47-1703, D.C. Code, 1940.

ARGUMENT.

The question is important.

There is no question but that each respondent was engaged, as both the Court of Appeals and the Board of Tax Appeals found, in a commercial banking business and all the activities which that phrase implies (R. 24, 478). It is also indisputable, as both the lower tribunals also found, that each respondent had substantial savings deposits upon which it paid interest (R. 24, 25, 478).

The language of Secs. 1701 and 1703 is plain and unambiguous. Sec. 1701 taxes "each national bank * * * and all other incorporated banks and trust companies" at the rate therein prescribed. Sec. 1703 taxes "savings banks having no capital stock and paying interest to their depositors", and "incorporated savings banks paying interest to their depositors" at the respective rates therein prescribed.

The Board concluded that Hamilton National Bank must be taxed under Sec. 1701, and that the non-national banks must be taxed under Sec. 1703. The "standards" used by the Board in reaching those conclusions consisted of "consideration of the character of business done by the appealing banks, and the legislative and administrative history of the applicable statutes". (R. 24, 26, 479.)

As we read the opinion, the United States Court of Appeals for the District of Columbia Circuit held:

(1) The Board "was justified in holding the state-chartered banks to be taxable under § 1703 as incorporated savings banks" (R. 481);

(2) "Measured by the standards used by the Board in concluding state banks are incorporated savings banks", the Hamilton National Bank (respondent in No. 385) is "of the same character" (R. 480);

(3) In view of the two foregoing premises, to tax national banks in accordance with the classification made and at the rate fixed by Congress in Sec. 1701 is not permissible because Congress did not intend national banks to be so taxed; but even if Congress intended national banks to be taxed at the rate prescribed by Sec. 1701, the classification made by Congress results in such oppressive discrimination against national banks as to be unconstitutional by denying them "the due process guaranteed by the Fifth Amendment and the equal protection of the

laws implied therein for the benefit of the inhabitants of the District of Columbia" (R. 482).

The respondents herein are neither "national banks" nor "trust companies". On the basis of business done by them, respondents do not come within the traditional meaning of the term "incorporated savings banks" (R. 481). It is petitioner's position that non-national banks could be classified for taxation as "other incorporated banks" and taxed under Sec. 1701 without doing any violence to the plain language of either Sec. 1701 or Sec. 1703. Thus, even if the United States Court of Appeals be correct in holding that the Fifth Amendment affords "equal protection", and even if the classification by Congress of two separate and distinct classes of banks (national and non-national)for tax purposes at different rates amounts to a denial of "equal protection", a holding by the Court of Appeals that both national and non-national banks are subject to taxation under Sec. 1701 would have eliminated both the discrimination found by the Court to exist and also all question of denial of "equal protection". By these statements petitioner does not, for one moment, imply that it concurs in the theory of the Court of Appeals that "equal protection of the laws" for the inhabitants of the District of Columbia is implied in the Fifth Amendment to the Federal Constitution. On the contrary, petitioner submits that the decisions of this Court make it abundantly clear that there is no "equal protection of the laws" expressed or implied in the Fifth Amendment.[7]

The Court of Appeals rejected the contentions of the District Government that (1) Congress classified "national banks" for tax only under Sec. 1701 and that, therefore, no administrative official had power to change that classification, and (2) if any discriminations existed in the taxation of banks in the District those discriminations could be

[7] See, for example, *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463, 468, 86 L. Ed. 343, 62 S. Ct. 341.

removed, if they must be, only by subjecting the non-national banks to tax under the same provision as national banks, viz., Sec. 1701. Instead, the Court disregarded the plain language of Sec. 1701 and held that national banks must be taxed under Sec. 1703 in spite of the fact that Congress did not mention national banks in that latter section.

The effect of the decision of the Court of Appeals is to effectively repeal, by implication, Sec. 1701 insofar as that provision of law taxes banks. Under Sec. 1701 the tax is imposed on "each national bank" and "all other incorporated banks and trust companies" in the District. Aside from "trust companies", there are, of course, no banks in the District other than national banks and these respondents. If, as the Court of Appeals has held, both types of banks must be classified under Sec. 1703 for tax purposes, there will be, therefore, no banks subject to tax under Sec. 1701. And if national banks are to be taxed as "incorporated savings banks paying interest to their depositors" a very appealing and logical argument could be made in behalf of "trust companies", which were also designated for tax under Sec. 1701, that they too must be taxed as "incorporated savings banks paying interest to their depositors" under the amendatory Act of 1904, since trust companies in the District of Columbia as well as national banks are under the regulatory control of the Comptroller of the Currency, and, as is common knowledge in the District, have savings accounts upon which they pay interest to their depositors. As a matter of fact, in *Watts* v. *American Security & Trust Co.*, 47 A. 2d 100, the Municipal Court of Appeals for the District of Columbia referred to the trust company involved as the "appellee bank". If, however, on the other hand, "trust companies" are to remain subject to tax under Sec. 1701 at the higher rate, will they not have a valid claim for "equal protection"? While it is true that to construe the statute so as to tax "trust companies" at a

higher rate of tax than "state banks" would not be "at war with the clear Congressional purpose expressed in § 5219 of the Revised Statutes" in the same manner that the Court of Appeals suggested would be true with respect to "national banks" (R. 482), the trust companies would, however, be protected from a construction subjecting them to taxation under Sec. 1701 by "equal protection of the laws", which the Court of Appeals said ought to be included or implied in the Fifth Amendment to the Federal Constitution. Thus the effect of the decision of the Court of Appeals is to repeal Sec. 1701 by implication. It is a well-established rule that repeals by implication are not favored, and that a general statute, without negative words, will not repeal particular provisions of a former statute, unless the two acts are irreconcilably inconsistent.[8] **Moreover, Sec. 1701 was reenacted by the Congress in 1939 without any change in the language with respect to the taxation of banks and trust companies.**[9]

But for the decision of the Court of Appeals that these respondents were properly subject to tax only under Sec. 1703, there would have been no question of "discriminations" and, hence, no question of "due process" or of "equal protection of the laws". For that reason, it is believed that a proper consideration of the case of *District of Columbia* v. *Hamilton National Bank*, No. 385, October Term, 1949, is inseparable from the consideration of these cases.

CONCLUSION.

It is, therefore, respectfully submitted that these cases call for the exercise by this Court of its supervisory powers, in order that a proper construction of the Constitution

[8] *Wood* v. *United States*, 41 U. S. (16 Pet.) 342, 10 L. Ed. 987; *United States* v. *Henderson*, 78 U. S. (11 Wall.) 652, 657, 20 L. Ed. 235; *Wilmot* v. *Mudge*, 103 U. S. (13 Otto) 217, 26 L. Ed. 536; *Frost* v. *Wenie*, 157 U. S. 46, 39 L. Ed. 614, 619, 15 S. Ct. 532.

[9] Act of July 26, 1939, 53 Stat. 1107, Ch. 367, title IV, Sec. 2.

and of the Acts of Congress involved may be had, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia Circuit in these cases, and finally reverse it.

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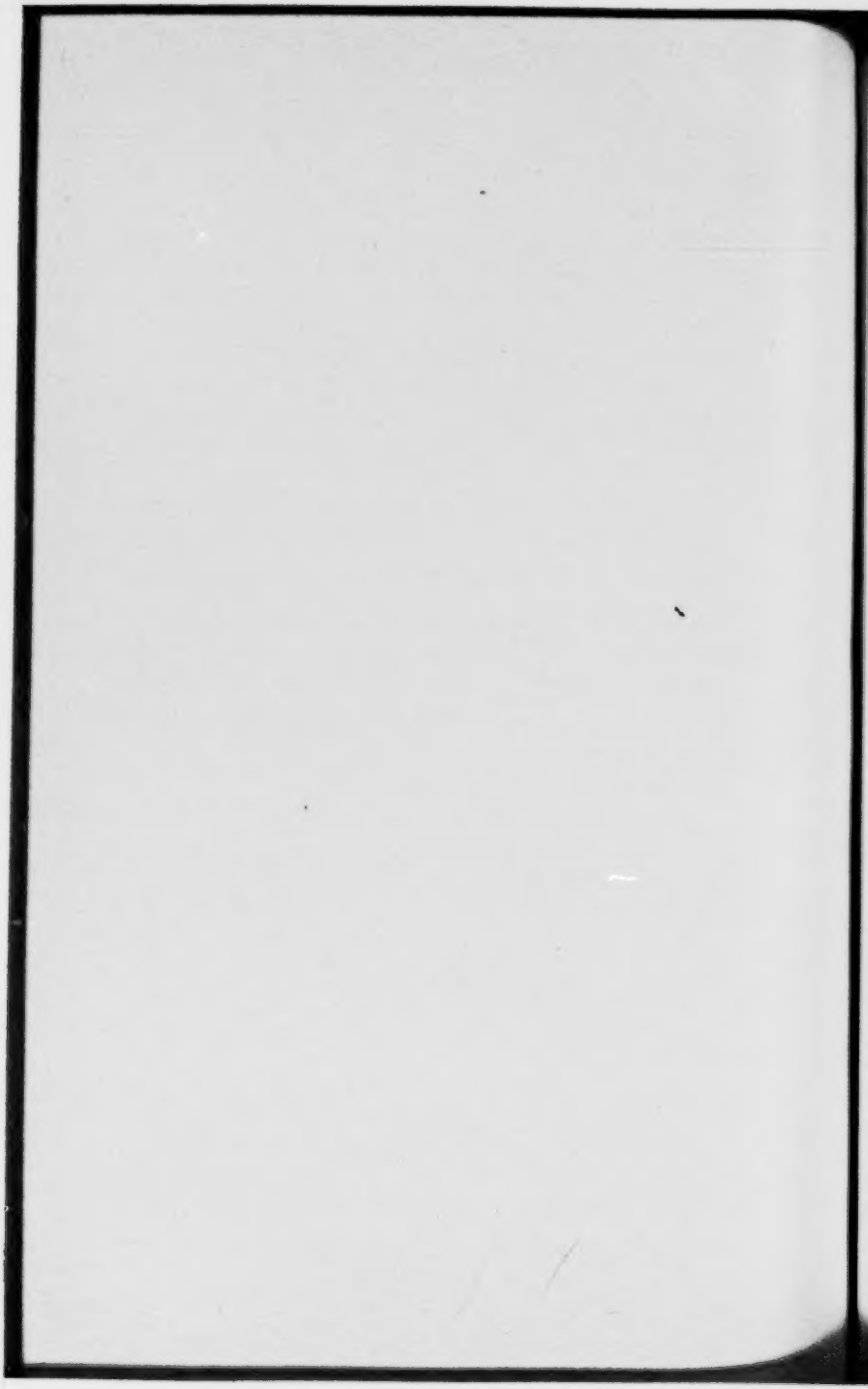
APPENDIX

Opinion of the United States Court of Appeals for the District of Columbia Circuit in Hamilton National Bank v. District of Columbia (1946), 81 U. S. App. D. C. 200, 156 F. 2d 843.



UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA

No. 9192

HAMILTON NATIONAL BANK, PETITIONER

v.

DISTRICT OF COLUMBIA, RESPONDENT

On Petition for Review of Decision of the Board of Tax Appeals for the District of Columbia

---

Argued May 28, 1946. Decided June 28, 1946.

Mr. Roger J. Whiteford, with whom *Mr. Philip S. Peyser* was on the brief, for petitioner.

Mr. Harry L. Walker, Assistant Corporation Counsel, District of Columbia, with whom *Mr. Vernon E. West,* Corporation Counsel, District of Columbia, and *Mr. Chester H. Gray,* Principal Assistant Corporation Counsel, District of Columbia, were on the brief, for respondent.

Before GRONER, C. J., and EDGERTON and PRETTYMAN, JJ.

PRETTYMAN, J.: Petitioner is a national bank doing business in the District of Columbia. There are in the District other national banks and also banks incorporated

under various state laws. Some of these banks, both national and state, have savings departments and pay interest to savings depositors. These same banks do a general commercial banking business.

Two pertinent statutes impose taxes on banks in the District of Columbia. One provides that every national bank and all other incorporated banks shall pay 6 per cent a year on their gross earnings.[1] The other provides that incorporated savings banks shall pay 4 per cent a year on their gross earnings less the interest paid to their depositors.[2] The first was enacted in 1902 and the second in 1904.

The local taxing authorities treat banks incorporated under state laws as incorporated savings banks and treat national banks as not savings banks. Petitioner protested its assessment, claiming the right to deduct from its gross earnings the interest paid its depositors. The Board of Tax Appeals for the District of Columbia affirmed the Assessor. Petition for review of that decision by this court was then filed.

Petitioner makes three contentions. The first is that interest paid depositors on savings accounts is deductible in computing gross earnings, under the doctrine of *District of Columbia* v. *Georgetown Gaslight Co.*, 45 App. D. C. 63 (1916), and *Chesapeake & Potomac Telephone Co.* v. *District of Columbia*, 78 U. S. App. D. C. 53, 137 F. 2d 674 (1943). In the *Georgetown Gaslight Company* case, this court held that the cost of raw materials used in manufacture is deductible from gross receipts in computing gross earnings. In the *Telephone Company* case, this court applied the same doctrine to the cost of telephone directories supplied subscribers by the company. But we are not disposed to extend the doctrine of those cases. Gross receipts, gross income, and net income are different concepts. We need not venture too far into the discussion

[1] D. C. Code (1940) § 47-1701.
[2] D. C. Code (1940) § 47-1703.

which has engulfed the subject for a half-century.[3] Receipts differ from income as a matter of economic concept and constitutional importance, the former including capital and the latter not. Gross income becomes net by deductions. "Gross earnings" is not so certain in meaning but, generally speaking, means gross income. In this scheme of things, the cost of raw materials is eliminated from receipts to ascertain income, because income is gain and no gain is derived until cost of goods is recovered. In this same scheme of things, interest paid is, by established practice, a deduction from gross income in the computation of net income. Interest paid by banks on savings accounts is so treated.[4] Petitioner's contention is, in ultimate substance, either that interest on savings accounts is an elimination from receipts in the computation of gross income, or that gross earnings differ from gross income in that items like this interest must be eliminated from the latter to ascertain the former. It argues that interest paid depositors is to a bank the cost of its raw material, *i.e.*, money; or at least the same sort of an item as a telephone book to a telephone company. The rationale of the rule is difficult to state,[5] but we are not disposed to depart from the traditional treatment of the item. The same result is indicated by the provision of the Code here involved, which refers to "gross earnings, less the amount paid as interest to their depositors", when the deduction of interest was intended. We agree with the Board of Tax Appeals that this interest falls within the deductions from gross income or gross earnings in the computation of net income, rather than among the eliminations which must be made from gross receipts in order to ascertain income or earnings.

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[3] *See* 1 MERTENS, LAW OF FEDERAL INCOME TAXATION (1942) c. 5.

[4] *See* U. S. Treas. Reg. 111, § 29.23(b)-1; First National Bank of Braddock, 38 B. T. A. 1244 (1938).

[5] For federal income tax purposes, cost of goods sold is determined for mercantile and manufacturing companies by the use of inventories. The Treasury includes as raw materials those which have been acquired for sale or which will physically become part of merchandise intended for sale. U. S. Treas. Reg. 111, § 29.22(c)-1. *See* Francisco Sugar Co. v. Comm'r, 47 F. 2d 555 (C. C. A. 2d, 1931); Burroughs Adding Machine Co., 9 B. T. A. 938 (1927).

Petitioner's second contention is that the difference in treatment accorded by the taxing authorities to national banks and state banks is an illegal discrimination which voids the tax upon petitioner. It is apparent that the 1904 act was intended to subject incorporated savings banks to a tax different from the tax imposed on other incorporated banks, including national banks. This classification of banks by the Congress for tax purposes rested upon reasonable differentials and was, therefore, valid. The questions are three: Was the test used by the administrative officers for determining what is a savings bank proper? If improper, was the test so improper as to be invalid? If the administrative action is invalid, what, if any, remedy is available to a national bank?

We do not think that the simple ascertainment of whether a bank has a national charter or a state charter is a proper method of determining whether the bank is or is not an incorporated savings bank. The test should have some relation to savings deposits. If state banks engaged in the savings-account business and national banks did not, the nature of the charter might be an easy rule of thumb for identifying a savings bank, or might be an inevitable coincidence with the fact of being a savings bank. But such is not the case. National banks are fully authorized to receive savings deposits and to pay interest on them.[6] This petitioner has time and savings deposits as large as, if not larger than, the similar deposits of the state banks classified as savings banks for tax purposes. On the other hand, the state banks do a general commercial banking business just as do the national banks; none is engaged exclusively in receiving and investing savings deposits. The charter powers of the several banks, national and state, vary in detail, but appear to be substantially equivalent in respects pertinent here. All are under the same regulatory control, the Comp-

[6] 12 U. S. C. A. § 371.

troller of the Currency.[7] The rates of interest paid savings depositors are "pretty much uniform". The evidence upon the hearing was that so far as commercial and savings accounts are concerned the business is identical. So that, so far as savings deposits are concerned, there is no difference between the national banks and the state banks. For that reason, we do not think that an administrative classification of state banks as savings banks, and national banks as not savings banks, is proper. As we said in *Neild* v. *District of Columbia,*[8] in discussing Congressional power, the selection for classification must "rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed". As we said again, in *A-C Inv. Ass'n* v. *Helvering,*[9] discussing what is a savings bank under the federal income tax law, the answer is reached "by viewing what was actually done." Legally speaking, the test applied by the administrative authorities in the case at bar is arbitrary.

The next question is whether the administrative action is so improper as to be invalid. The equal-protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states.[10] The Fifth Amendment, of course, does apply, but it contains no equal-protection clause. The Supreme Court has held as settled that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due-process clause,[11] and has intimated that discrimination, if gross enough, might invalidate an act of Congress as equivalent to confiscation and therefore void under the Fifth Amendment.[12] But we are not considering the validity of an act of Congress and need not go into the question

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[7] D. C. Code (1940) § 26-101.
[8] 71 App. D. C. 306, 110 F. 2d 246 (1940).
[9] 62 App. D. C. 339, 68 F. 2d 386 (1933).
[10] *Wight* v. *Davidson,* 181 U. S. 371, 45 L. Ed. 900, 21 S. Ct. 616 (1901).
[11] *Heiner* v. *Donnan,* 285 U. S. 312, 326, 76 L. Ed. 772, 52 S. Ct. 358 (1932).
[12] *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585, 81 L. Ed. 1279, 57 S. Ct. 883 (1937); *see Neild* v. *District of Columbia, supra.*

whether Congress itself could provide a differential in tax for savings banks and in the same enactment define a savings bank as a bank with a state charter. The matter before us is the validity of an administrative action, and the scope of the power of classification by an administrator under a statute is obviously much less broad than is the power of the Congress in the first instance. While an interpretative administrative regulation consistent with the statute has great weight, one which "operates to create a rule out of harmony with the statute, is a mere nullity."[13] We do not think that an administrative officer can restrict a statutory term such as "incorporated savings bank" by a definition having no relation to savings deposits or accounts. He cannot eliminate, by administrative definition, from the statutory provision some institutions identical in all respects related to savings deposits with institutions included in his definition. His attempt to do so is invalid as not in harmony with the statute.

In the view which we take of the case, it is not necessary for us to define an incorporated savings bank. "Until recently," the Supreme Court said in 1878,[14] the primary idea of a savings bank was an institution in the hands of disinterested persons, the profits of which inured wholly to the benefit of the depositors. It was, said the Court, quasi benevolent. That case concerned a savings bank in the District of Columbia incorporated by an act of Congress, and called the "National Union Savings-Bank of the District of Columbia". In 1883 the Supreme Court of the District of Columbia considered a case[15] in which an incorporated savings bank was converted by its trustees into a national banking association, pursuant to Section 5154 of the Revised Statutes and an act of June 30, 1876.[16] The

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[13] *Manhattan Co.* v. *Comm'r*, 297 U. S. 129, 134, 80 L. Ed. 528, 56 S. Ct. 397 (1936).

[14] *Huntington* v. *Nat. Savings Bank*, 96 U. S. 388, 24 L. Ed. 777 (1878).

[15] *Keyser* v. *Hitz*, 2 Mackey 473 (1883).

[16] 19 Stat. 64.

latter act provided that "all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks:".[17] The court thought that there might be a question whether that act did not, by its own operation, and without the necessity of any action by the banks, convert the savings banks in the District of Columbia at once into national banks, but said that the practical interpretation of the act had been for the banks themselves to take some action of conversion. Historically, therefore, in the District of Columbia there is no incongruity between savings bank and national bank.

We have now to consider the disposition of the case. The fact that the administrative classification of banks is invalid does not, of itself, determine whether all these banks having identical savings-deposit businesses are or are not incorporated savings banks within the meaning of the statute. Respondent contends, and the Board of Tax Appeals held, that petitioner could not complain of the discrimination because the banks favored by the administrative practice are not in the proceeding. That position is obviously without merit. The person discriminated against is really the only person who can complain of the discrimination. Certainly he is the only one who does.

While, as we have said, the equal-protection clause does not apply here, the course followed by the Supreme Court in disposing of cases wherein administrative action has been held invalid because of that clause, furnishes a guide for

[17] The quoted provision of the 1876 act was included in the 1901 Code, Section 713, but was omitted in an amendatory enactment of June 30, 1902 (32 Stat. 534). We have been unable to find any helpful legislative history relating to this amendment. Various statutes relating to national banks were extended to apply to savings banks in the District of Columbia by an act of March 4, 1933 (47 Stat. 1566, D. C. Code (1940) § 26-104).

our action here. In *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923), and again in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 76 L. Ed. 265, 52 S. Ct. 133 (1931), the Court, faced with this same dilemma, directed that the higher tax be reduced to the level of the favored taxpayers. Chief Justice Taft, in the former case, said that this should be done "even though this is a departure from the requirement of statute." He said:

> "The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

The difference in treatment accorded the national banks and the state banks, reflected in the record in the case at bar, is not a mistake or an error in judgment; it was shown to be consciously done, and in that sense intentional, and systematic.[18]

But our relation to the Board of Tax Appeals of the District of Columbia is more flexible than the relationship of the Supreme Court to the courts of the several states, and permits of directives as well as the usual appellate dispositions. The Board is "a constituent member of the assessing authority."[19] Our power to review its decisions is "as under the equity practice in which the whole case, both facts and law, is open for consideration",[20]—"the scope of a review of an equity court." The definition of "incorporated savings bank" is not merely the temporary disposition of the

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[18] *Charleston Ass'n* v. *Alderson*, 324 U. S. 182, 190, 89 L. Ed. 621, 65 S. Ct. 624 (1945).

[19] *Watrous* v. *District of Columbia*, 77 U. S. App. D. C. 295, 135 F. 2d 654 (1943).

[20] *District of Columbia* v. *Pace*, 320 U. S. 698, 88 L. Ed. 408, 64 S. Ct. 406 (1944).

single assessment in the present proceeding but obviously concerns the taxation of the entire group of local banks as a continuing matter. The interests of all the banks are involved. The facts of the situation in 1904 when Congress enacted the special statute relating to incorporated savings banks, are pertinent. The various statutes which interrelate the local savings banks with the national banking laws would appear to have a bearing. The Comptroller of the Currency, under whose supervision all these banks operate, may have important interests in the subject or views which may be valuable. This factual data is by no means complete in the record before us. Moreover, the matter is of the sort which should first be crystallized by administrative action. The decision of the Board in this case will be reversed and the case remanded, with instructions to cancel the present assessment unless the tax Assessor, upon a reexamination of the entire subject of taxing banks under these statutes, removes the discriminations presently existing, in which latter event the validity of his further proposals may be considered.

Petitioner's third contention is that the proposed tax is a discrimination violative of Section 5219 of the Revised Statutes.[21] But that statute is addressed to the legislatures of the states, and the statutes with which we are concerned are acts of the Congress. Section 5219 is of value here as an indication of Congressional policy. To that extent petitioner's contention is sound. Our view of the case is in accord with that policy. But the section is not controlling in terms. Congress could, if it chose, tax national banks without regard to its provisions.

Reversed and remanded for further proceedings in accordance with this opinion.

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[21] 12 U. S. C. A. § 548.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 401

DISTRICT OF COLUMBIA, *Petitioner,*

v.

BANK OF COMMERCE AND SAVINGS, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF IN OPPOSITION.

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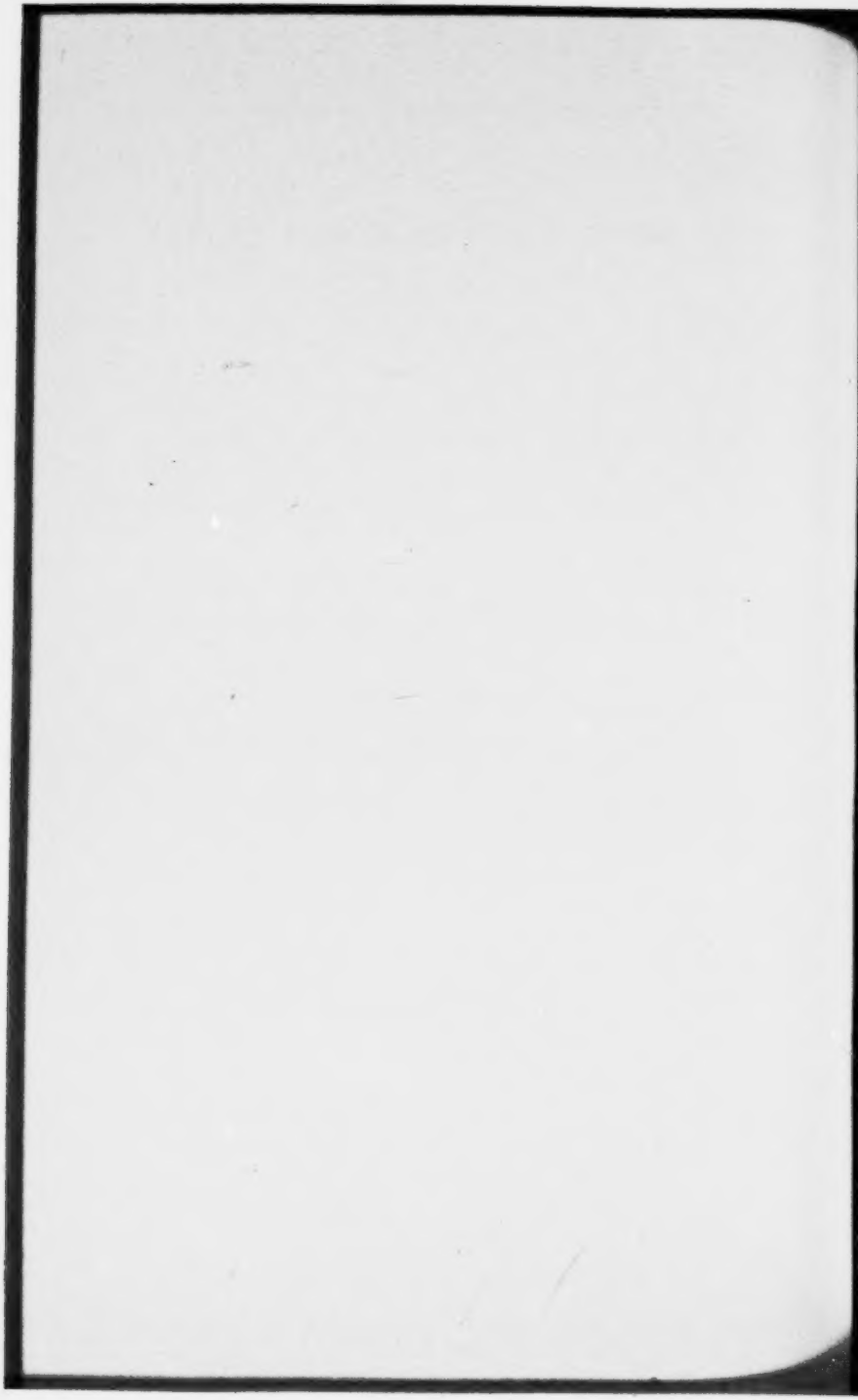

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DISTRICT OF COLUMBIA, *Petitioner*,

v.

BANK OF COMMERCE AND SAVINGS, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF IN OPPOSITION.[1]

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 476-483) is not reported as yet. The findings of fact, conclusions of law,

[1] The brief is jointly filed on behalf of the Bank of Commerce and Savings, The Security Savings & Commercial Bank, The City Bank of Washington, McLachlen Banking Corporation, Anacostia National Bank of Washington, and Industrial Bank of Washington, Inc., but not on behalf of the other respondent, The Citizens' Bank of Washington.

and opinion of the Board of Tax Appeals for the District of Columbia (R. 2-26, 39-44, 235-240, 293-297, 339-343, 377-381) are reported in part at 76 W.L.R. 633.

JURISDICTION.

The judgments of the Court of Appeals in these six cases were entered on May 21, 1949 (R. 484-485). The District's petition for rehearing before the Court of Appeals *en banc* was filed on June 14, 1949, and denied on July 20, 1949 (R. 493-494). The petition for certiorari was filed on October 14, 1949. The jurisdiction of this Court rests on Section 1254, Title 28, U.S.C.

QUESTION PRESENTED.

Whether, as a matter of statutory construction, the respondents are taxable under Section 47-1701, D. C. Code (1940), which imposes a tax of 6% on the gross earnings of "Each national bank . . . and all other incorporated banks and trust companies . . ." in the District of Columbia, or under Section 47-1703, which imposes a tax of 4% on the amount of gross earnings less interest paid to depositors of "Incorporated savings banks . . ." In short, the question is whether respondents are "incorporated banks" within the meaning of Section 47-1701 or "incorporated savings banks" within the meaning of Section 47-1703.

STATUTES INVOLVED.

Paragraph 5 of Section 6 of the Act of July 1, 1902, 32 Stat. 619, as amended, reads in pertinent part, as codified in Section 47-1701, D. C. Code (1940), as follows:

> "§ 47-1701 . . . Each national bank as trustee for its stockholders, through its president or cashier, and all other incorporated banks and trust companies in the District of Columbia, through their presidents or cashiers, . . . shall make affidavit to the board of personal-tax appraisers on or before the 1st day of August each year as to the amount of its . . . gross earnings . . .

for the preceding year ending the 30th day of June, and each national bank and all other incorporated banks and trust companies respectively shall pay to the collector of taxes of the District of Columbia per annum 6 per centum on such gross earnings . . . And in addition thereto the real estate owned by each national or other incorporated bank, and each trust . . . company in the District of Columbia shall be taxed as other real estate in said District . . .."

Paragraph 7 of Section 6 of the Act of July 1, 1902, 32 Stat. 619, as codified in the first paragraph of Section 47-1703, D. C. Code (1940), reads as follows:

"§ 47-1703 . . . Savings banks having no capital stock and paying interest to their depositors shall, through their president or cashier, make affidavit to the board of personal-tax appraisers on or before the 1st day of August in each year as to the amount of their surplus and undivided profits, and shall pay to the Collector of taxes of the District of Columbia a sum equal to one and one-half per centum on the amount of their surplus and undivided profits on the 30th day of June preceding."

Section 2 of the Act of April 28, 1904, 33 Stat. 564, which was amendatory of Paragraph 7 of Section 6 of the Act of July 1, 1904, reads, as codified in the second paragraph of Section 47-1703, D. C. Code (1940), as follows:

"§ 47-1703, * * * Incorporated savings banks paying interest to their depositors shall, through their president or cashier, make report under oath to the board of personal-tax appraisers on or before the 1st day of August in each year as to the amount of their gross earnings, less the amount paid as interest to their depositors for the preceding year ending June 30th, and shall pay thereon to the collector of taxes of the District of Columbia four per centum per annum."

STATEMENT.

Respondents believe that petitioner's Statement of the Case (Pet. 1-8) should be supplemented as follows:

1. Legislative and Administrative Histories of Legislation Involved.

In 1902, Congress enacted the bank tax legislation for the District of Columbia, now known as Sections 1701 and 1703 of Title 47 of the District of Columbia Code, 1940.[2] Under Section 1701, national banks, trust companies and "other incorporated banks" were to be taxed at the rate of six percent upon their gross earnings. Under Section 1703 savings banks having no capital stock and paying interest to their depositors were to be taxed at the rate of one and one-half percent on the amount of their surplus and undivided profits.

In 1902, there were in the District of Columbia national banks, trust companies and certain non-nationally incorporated banks, but no savings banks having no capital stock.[3] The non-nationally incorporated banks did an active commercial business and accepted savings deposits on which they paid interest.[4] The national banks and trust companies did not accept savings deposits.[5]

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[2] Paragraphs 5 and 7 of Section 6 of the Act of July 1, 1902, 32 Stat. 619, set forth above under "Statutes Involved".

[3] Cf. R. 106-107 with R. 116; Rep. Comp. Curr. (1901) XXVII; Rep. Comp. Curr. (1902) XXXII.

[4] R. 44-50, 117-119, 122-123, 217-219. In a committee print of the Senate Committee on the District of Columbia dated May 16, 1902, these non-nationally incorporated banks were classified under the heading, "Savings Banks" (R. 106-107).

[5] Cf. R. 12-13, 186-189, 192-199, 201-205. In 1903 the Comptroller of the Currency refused to express an opinion of the question whether a national bank had the authority to accept savings accounts (R. 153-154). In 1904, it was thought in local banking circles that a national bank did not have authority to accept savings accounts (cf. R. 56). National banks were not expressly authorized to accept "time deposits" until 1913. And it was not until 1927 that national banks were expressly authorized to accept savings accounts. (R. 155.)

In 1904, Section 1703 was amended to provide that incorporated savings banks paying interest to their depositors should be taxed at the rate of four percent upon their gross earnings, less interest paid to their depositors.[6] Prior to amendment of 1904, the national banks and trust companies and non-nationally incorporated banks were all taxed under Section 1701 at the rate of six percent of their gross earnings. Upon the passage of the amendment of 1904,[7] the assessing authority of the District of Columbia discontinued assessing the non-nationally incorporated banks under Section 1701 and assessed them under Section 1703, as amended, at the four percent rate, and continued to so assess them as long as they remained in existence.[8] The assessment of national banks and trust companies under Section 1701 was continued. They have been so assessed up to the present time.

These respondents, each of which operates under a charter granted either by the laws of one of the States or by the laws of the District of Columbia,[8a] started business in the District of Columbia in the years indicated below:

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[6] Section 2 of the Act of April 28, 1904, 33 Stat. 564, set out above under "Statutes Involved".

[7] At the time of the amendment of 1904, there were in the District of Columbia the same three kinds of banks or financial institutions as there had been at the time of the passage of the Act of 1902; namely, (1) national banks; (2) non-nationally incorporated banks and trust companies (R. 115-124). In 1904, as in 1902, the only banks having savings deposits in the District of Columbia were the non-nationally incorporated banks (R. 115-124; Cf. R. 186-189, 192-199, 201-205). Each of the non-nationally incorporated banks were, in 1904, engaging actively in commercial banking as well as savings bank. (R. 10, 44-51, 51-60, 60-64, 74-75, 115-124. A discussion of the 1904 amendment in the Senate Committee on the District of Columbia shows that the amendment was intended to afford relief to the non-nationally incorporated banks (R. 108-114).

[8] R. 168. One of the non-nationally incorporated banks in existence in 1904, the Potomac Savings Bank, did not go out of existence until 1934. (Cf. R. 51 with R. 168).

[8a] Respondent Anacostia National Bank did not secure a national charter until 1946. It is the successor of the Anacostia Bank which, at all times pertinent to these proceedings, operated under a charter granted pursuant to the laws of the State of West Virginia. (R. 339-340)

	Year
Bank of Commerce and Savings	1907
The Security Savings and Commercial Bank	1913
The City Bank of Washington	1906
McLachlen Banking Corporation	*[9]
Anacostia National Bank of Washington	1910
Industrial Bank of Washington, Inc.	1934

These respondents have always done both a savings and commercial business. They have been always assessed under Section 1703 by the taxing authority of the District of Columbia up to and including the fiscal year 1944.

During the period between 1904 and 1944, the Assessor and the Corporation Counsel for the District of Columbia on several occasions considered the nature of the banks subject to taxation as "incorporated savings banks" within the meaning of Section 1703. As late as 1942, they concluded that the provisions of that legislation were applicable to these respondents because they were doing the same type of business as that done by "the savings banks operating in the District at the time of the amendment of April 28, 1904."[10] There was no material change between the business done by these respondents in 1942 and that done by them in 1945.[11]

The evidence before the Board of Tax Appeals showed, among other things, that in 1932, a bill was introduced in Congress by Senator Capper, the Chairman of the Senate Committee on the District of Columbia, to amend Paragraph 5 of Section 6 of the Act of July 1, 1902, now Section 1701 of Title 47 of the present Code. Reports on this bill were prepared, at Senator Capper's request, by

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[9] The McLachlen Banking Corporation was chartered in Virginia in 1891 as the McLachlen and Batchelder Company (R. 312). In 1894, the name of the Company was changed to McLachlen Real Estate and Loan Company (R. 298). It was not until 1907 that the name of the Company was changed to McLachlen Banking Corporation (K. 299).

[10] Cf. R. 72-73 and 257-258 with R. 130-152.

[11] Cf. R. 20-21.

the U. S. Bureau of Efficiency and by officials of the District of Columbia. In these reports, all of the facts concerning the taxation of banks in the District, including the alleged discrimination between the taxation of national banks and incorporated savings banks, were brought fully to the attention of Congress. Congress did not, however, amend the laws relating to the taxation of banks in the District of Columbia (R. 134-150). Furthermore, in 1939, pursuant to an Act of Congress, a complete and searching survey of the tax system of the District was made and a report thereof, commonly known as the "Pond Report,"[12] was submitted to Congress. Bank taxes were discussed in this report.[13] And the attention of Congress was again called to the difference between the taxation of national banks and incorporated savings banks:

> "Originally, incorporated savings banks paid the 6-per cent rate but it was cut to 4 per cent in 1904. National banks and trust companies now do a considerable business in their savings departments, yet are taxed at a higher rate and with no deduction allowed for interest paid to their depositors."[14]

Though the Congress did make extensive changes in the tax system of the District as a result of the "Pond Report", it left standing the provisions of Sections 1701 and 1703 insofar as they provided for taxation of banks in the District of Columbia.

2. Proceedings Before Board of Tax Appeals and Court of Appeals.

In September, 1944, the taxing authority of the District assessed each of these respondents as "incorporated savings banks" under Section 1703 for the fiscal year 1945

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[12] District of Columbia Tax Study: Report pursuant to the Act of May 16, 1938. (House Document No. 108, 76th Cong., 1st Sess.)

[13] *Id.*, pp. 41-42.

[14] *Id.*, p. 42.

(July 1, 1944 through June 30, 1945).[15] The respondents duly paid the assessments thus made against them.[16] Then, shortly after the opinion of the United States Court of Appeals for the District of Columbia in the case of Hamilton National Bank v. District of Columbia, decided June 28, 1946,[17] the taxing authority of the District in October 1946 reassessed the respondents for the fiscal year 1945 as "other incorporated banks" under Section 1701.[18]

The respondents thereupon filed their separate petitions with the Board of Tax Appeals of the District of Columbia appealing from the reassessments.[19] Separate hearings were made on each petition,[20] and the Board of Tax Appeals entered its findings of fact, conclusions of law, and decision separately in each case in favor of the respondents.[21] The Board also entered a memorandum opinion in the course of which it held that respondents, in light of the legislative and administrative histories of the Section 1703, were "incorporated savings banks" within the meaning of that section.[22]

The petitioner filed separate petitions in the United States Court of Appeals for the District of Columbia, seeking to review the decisions of the Board of Tax Appeals.[23] These cases were not consolidated but, for the convenience of the Court of Appeals, were argued at the same time, and were followed by argument in the case of The Citizens' Bank of Washington and then by argument in the case of the Hamilton National Bank. The Court of Appeals ren-

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[15] R. 4, 41, 238, 295, 341, 379.

[16] *Ibid.*

[17] 81 U. S. App. D. C. 200, 156 F. (2) 843.

[18] R. 4-5, 42-43, 238-240, 296-297, 342-343, 380-381. Cf. R. 227, 291, 333, 369, 430.

[19] R. 5, 43, 239, 297, 343, 381.

[20] R. 27-37, 44-92, 240-291, 298-337, 344-369, 382-431.

[21] R. 2-21; 26-27, 39-44, 235-240, 293-298, 339-343, 377-381.

[22] R. 22-26.

[23] R. 1, 39, 235, 293, 339, 371.

dered one opinion covering all of the cases mentioned.[24] But that opinion is clearly divisible in two parts, one having to do with the respondents' cases; the other, with the case of the Hamilton National Bank. This opinion, insofar as these respondents are concerned, unanimously affirmed the decisions of the Board of Tax Appeals of the District of Columbia in favor of the respondents. In ruling in respondents' favor, the Court said (R. 481):

> "As heretofore noted, after the first Hamilton National case was remanded, the Assessor decided there is no bank or trust company in the District of Columbia classifiable as 'an incorporated savings bank paying interest to its depositors.' The Assessor was correct only if a savings bank be thought of in the traditional sense of the term as an institution which confines its business to interest-bearing savings deposits. But, in the light of the legislative history of the 1904 amendment to Sec. 1703, it is not demonstrably true that Congress intended so to restrict the term. A legislative intent not to apply the amendment solely to strictly savings banks is indicated because (a) there were no such savings banks in the District in 1904, and (b) the banks at whose instance the amendment was adopted were engaged in commercial banking as well as in receiving savings deposits.
>
> "The administrative interpretation of the 1904 amendment as applicable to commercial banks with substantial savings departments, which began immediately and has since continued, was therefore not without some statutory basis, or at least was not in the teeth of the amendment. Prolonged administrative construction, if not illegal or unconstitutional, is given great weight in interpreting statutes. In our opinion the Board of Tax Appeals was justified in holding the state-chartered banks to be taxable under Sec. 1703 as incorporated savings banks. The orders of the Board of Tax Appeals in the cases numbered 9834 to 9840, inclusive, are affirmed."

[24] R. 476-483.

GROUNDS OF OPPOSITION TO PETITION.

Respondents oppose the granting of the petition because, contrary to the arguments and assertions of petitioner (Pet. 9-11, 13, 15-20):

1. The Court of Appeals has not decided a question of substance relating to the construction of the Constitution, since no constitutional question is involved in the cases of these respondents.

2. The Court of Appeals has given proper effect to the decisions of this Court applicable to the question decided in the cases of these respondents.

3. The Court of Appeals has not decided an important question of law involving the Constitution, and its decision is not in conflict with its own prior decisions or with the decisions of this Court relating to the power of Congress.

ARGUMENT.

In the petition itself (Pet. 9-10), four reasons are given why a writ of certiorari should be granted. In the initial part of its brief in support of the petition, petitioner has condensed (Pet. 13) these four reasons to three. However, an analysis of the petitioner's argument in support of the petition (Pet. 15), shows that it advances, in substance, only two contentions in support of its prayer for a writ.

Petitioner states its first contention thus (Pet. 17): "It is petitioner's position that non-national banks could be classified for taxation as 'other incorporated banks' and taxed under Section 1701 without doing any violence to the plain language of either 1701 or 1703." This is but the same contention which petitioner urged unsuccessfully before the Board of Tax Appeals and before the Court of Appeals, and which was rejected by both of these tribunals. This contention, it is obvious, presents purely a local question, relating to a municipal ordinance of the District of Columbia, and not one of sufficient importance to invoke this Court's attention.

Petitioner's second contention is that (Pet. 19): "But for the decision of the Court of Appeals that these respondents were properly subject to tax only under Section 1703, there would be no question of 'discrimination' and hence no question of 'due process' or of 'equal protection of the laws'." This contention likewise affords no reason to invoke the jurisdiction of this Court. It may be accurate to state that because the Board of Tax Appeals and the Court of Appeals have held respondents subject to tax only under Section 1703 that a question of discrimination, due process, or equal protection of the laws may arise in other cases involving the taxation of other types of banks, but such a statement has no weight in support of the present petition.

Aside from these two contentions, no argument is advanced in support of the four reasons relied on for allowance of the writ (Pet. 9-10). It is obvious why this is so. *First:* There is no constitutional question involved in the opinion of the Court of Appeals insofar as it applies to the cases of the respondents. *Second:* No decisions of this Court are suggested or discussed which have any bearing upon the opinion of the Court of Appeals insofar as it affects the cases of these respondents. *Third:* No attempt is made by petitioner to support the statement that the question presented in these cases is applicable not only with respect to determining the constitutionality of the particular statutes involved, but also to every statute enacted by the Federal Congress in the exercise of its exclusive jurisdiction to legislate for the District of Columbia. This question might arise under the issue of discrimination in connection with the taxation of other banks, but is not involved in that part of the opinion of the Court of Appeals affecting the cases of the respondents. *Fourth:* There is no question of general importance involved in the cases of the respondents. As stated by the petitioner on page 9 of its petition, the question presented is whether respondents should be taxed at the rate of six percent upon their gross

earnings under Section 1701 as incorporated banks or at the rate of four percent per annum upon their gross earnings, less the amount paid as interest to their depositors under Section 1703. This is not a question of general importance, but purely a local question concerning the gross earnings taxes of the respondents under a statute operative only within the municipal boundaries of the District of Columbia. It is revealing to note that petitioner does not question the substance of the opinion of the Court of Appeals insofar as it applies to the respondents. Strangely enough, it does not seem to question that the legislative and administrative histories of Section 1703 show, as the Court of Appeals held, that respondents are "incorporated savings banks". Petitioner's actual complaint seems to be only that the effect of the decision may require the reclassification of other types of banks.

From the above, it is evident that there are no substantial reasons why the petition for certiorari should be granted. After the decision of the Court of Appeals in the first Hamilton Bank case, the taxing authorities of the District of Columbia sought to eliminate the issue of discrimination by attempting to reassess the respondents as incorporated banks under Section 1701, departing from the procedure which had been followed for forty years. This may have been considered the expedient thing to do, but it could not be supported when questioned before the Board of Tax Appeals. Certainly, the discrimination, if any, could not be lawfully removed by taxing these respondents at a higher rate than that provided by the applicable law. It was plainly an attempt to solve the petitioner's problem in a manner that would meet its difficulty irrespective of its legality. The issue there and before the Court of Appeals, as stated above, was solely under which section the respondents should be taxed. No question of discrimination or constitutionality of the act was asserted. Therefore, when the Court of Appeals affirmed the decisions of the Board of Tax Appeals, the issues, insofar as these respondents are

concerned, were finally settled. The questions of discrimination and the legality of the assessments against national banks under Section 1701 may be involved in that part of the opinion of the Court of Appeals having to do with the case of the Hamilton National Bank, but how that bank should be taxed is not involved in the cases of the respondents. The question of whether a national bank should be taxed as a "national bank" under Section 1701 or as an "incorporated savings bank" under Section 1703, is a matter with which the respondents are not concerned and which cannot be raised in their cases.

Finally, in basing its decision favorable to these respondents upon the legislative history and administrative interpretation, the Court of Appeals gave proper effect to the decisions of this Court, and to its own decisions on the following propositions:

(a) In construing a statute the courts must look to "the history of the times" when it was passed in order to ascertain the reason as well as the meaning of particular provisions in it.[25]

(b) Congress is presumed to know of the long outstanding administrative construction of Sections 47-1701 and 47-1703, and, having failed to amend those acts, that administrative construction has full legislative endorsement;[26] and

(c) The long continued and consistent construction and interpretation of Sections 47-1701 and 47-1703 by the tax-

[25] *United States* v. *Union Pac. R. R. Co.*, 91 U. S. 72, 79. *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Platt* v. *Union Pac. RR. Co.*, 99 U. S. 48, 64; *Moorehead* v. *New York Ex Rel. Tepaldo*, 298 U. S. 587, 615.

[26] *Crane* v. *Com.*, 331 U. S. 1, 8 and 10; *Helvering* v. *A. J. Reynolds Co.*, 306 U. S. 110, 114, 115; *Helvering* v. *Winmill*, 305 U. S. 79, 83. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Corning Glass Works* v. *Robertson*, 62 App. D. C. 130, 65 F. (2d) 476 (cert. den. 290 U. S. 645); *United States Borax Co.* v. *Ickes*, 68 App. D. C. 399, 409, 98 F. (2d) 271 (cert. den. 306 U. S. 619).

ing authority of the District of Columbia are entitled to great weight and are not to be disturbed, except under unusual circumstances.[27]

CONCLUSION.

The unanimous decision of the Court of Appeals, insofar as it affects these respondents, involves no constitutional, Federal or other question of importance, but merely a question of the correct interpretation of a statute pertaining only to the District of Columbia. The Court of Appeals, in reaching its interpretation of the statute involved, acted consistently with the rules used by this Court in the interpretation of statutes. There is, therefore, no basis for the exercise by this Court of its supervisory powers.

Respectfully submitted,

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[27] *Skidmore* v. *Swift*, 322 U. S. 134; *Logan* v. *Davis*, 230 U. S. 613, 627; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 275; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *Billings* v. *Truesdell*, 321 U. S. 543; *Bardwell* v. *Petty*, 52 App. D. C. 310, 312, 286 Fed. 772, 774.

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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 401.

DISTRICT OF COLUMBIA, *Petitioner*,

v.

BANK OF COMMERCE AND SAVINGS, THE SECURITY SAVINGS AND COMMERCIAL BANK, THE CITY BANK OF WASHINGTON, MCLACHLEN BANKING CORPORATION, ANACOSTIA NATIONAL BANK OF WASHINGTON, INDUSTRIAL BANK OF WASHINGTON, INC., THE CITIZENS BANK OF WASHINGTON, *Respondents*.

BRIEF FOR RESPONDENT THE CITIZENS BANK OF WASHINGTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Washington, D. C.,
November 23, 1949.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 476) has not been reported officially. It was filed May 31, 1949 in Docket No. 9840, and is to be found in 176 F. 2d 624 and at par. 84-007 of the District of Columbia Tax Reporter published by

Commerce Clearing House, Inc. The opinion of the Board of Tax Appeals for the District of Columbia (R. 22-27) has not been reported officially but is to be found in Volume 76 of The Washington Law Reporter at pp. 633 *et seq.* It is to be found also in par. 84-004 of the District of Columbia Tax Reporter published by Commerce Clearing House, Inc.

STATEMENT OF THE CASE.

This case involves nothing but a local tax upon a local bank. The case involves only, and is concerned simply with, the construction of a local District of Columbia taxing statute. Insofar as this Respondent, The Citizens Bank of Washington, is concerned one question and only one question is presented by this case. That question is solely and simply whether for the tax fiscal year ended June 30, 1945 this Respondent, The Citizens Bank of Washington, is taxable as *"an incorporated savings bank paying interest to its depositors"* under the provisions of the Act of April 28, 1904, 33 Stat. 564, ch. 1815, sec. 2, fifth paragraph (second paragraph, Sec. 47-1703, D. C. Code, 1940 ed.).

There is nothing whatever in this case to bring it within any of the classes of cases to review which this Court grants certiorari. The Board of Tax Appeals for the District of Columbia upon the basis of the evidence presented to the Board determined that this Respondent, The Citizens Bank of Washington, was an incorporated savings bank within the meaning of the local taxing act and subject to taxation as such. (R. 26; 440.) Upon review of the Board's decision, the United States Court of Appeals for the District of Columbia Circuit affirmed the Board's decision. (R. 483.) Neither the Court of Appeals nor the Board decided any question of general importance nor any question of substance relating to the construction or application of the Constitution or a treaty or statute of the United States which has not been but should be settled by this Court. There is nothing in the Petition for Certiorari, in the brief

in support thereof, or elsewhere, to show that the Court of Appeals did not give proper effect to an applicable decision of this Court.

Respondent The Citizens Bank of Washington (hereinafter sometimes referred to as "Citizens") was incorporated in 1925 under the laws of the District of Columbia (Mar. 3, 1901, 31 Stat. 1284, ch. 854, sec. 605; June 30, 1902, 32 Stat. 533, ch. 1329; Sec. 29-201, D. C. Code, 1940 ed.) as "The Morris Plan Bank of Washington." In 1946 its name was changed to "The Citizens Bank of Washington". Its objects and purposes, as stated in its certificate of incorporation were to promote and encourage frugality and savings and to do a general savings business. In 1947 its stockholders placed it in voluntary liquidation. (R. 436.)

Citizens upon organization in 1925 acquired the business of the Fidelity Savings Company. (R. 184.) On June 30, 1944 Citizens had 9,602 regular savings accounts and in addition thereto 8,276 assigned savings accounts, which in the aggregate exceeded $3,500,000. (R. 436.) Citizens actively solicited and advertised for savings accounts. It spent about $30,000 per year for advertising, about one-half of which was spent in advertising for savings accounts. (R. 437.) During the years 1940 to 1945, inclusive, Citizens had regular savings deposits which exceeded its demand deposits, excluding War Loan deposits, except for the period during which War Loan campaigns were at their height, that is, for the year 1943 and the first half of the year 1944. For the period as a whole, total savings deposits far exceeded total demand deposits. (R. 467-468.) The earnings of Citizens were derived for the most part from interest on loans. (R. 470.) Its principal efforts were directed toward increasing its savings deposits and lending the money thus obtained, specializing in "consumer credit loans." (R. 445.) Its rates of interest paid upon savings accounts were constantly maintained at points greater than those paid by any other bank in the District of Columbia. (R. 451.)

For twenty years following the incorporation of Citizens, the Assessor of the District of Columbia assessed gross earnings taxes against Citizens as an incorporated savings bank by computing the tax at the rate of 4% upon gross earnings less interest paid to depositors. (R. 19; 26.) In the fall of the calendar year 1946, after the decision in the case of *Hamilton National Bank* v. *District of Columbia*, 81 U. S. App. D. C. 200, 156 F. 2d 843, the taxing authorities of the District of Columbia asserted for the first time that Citizens was not an incorporated savings bank and that it should be taxed under Sec. 47-1701, D. C. Code, 1940 ed. (R. 438.) Accordingly, on October 17, 1946, the Assessor made an additional assessment of gross-earnings tax against Citizens for the tax fiscal year 1945 based upon computation of tax at the rate of 6% without deduction for the interest paid savings depositors. (R. 439.) Citizens paid the additional tax under protest and filed an appeal with the Board of Tax Appeals for the District of Columbia. (R. 439.) The Board concluded that Citizens was an incorporated savings bank within the meaning of the second paragraph of Sec. 47-1703, D. C. Code, 1940 ed., (R. 21; 26.) and decided that the additional assessment should be cancelled (R. 440). The District of Columbia appealed to the United States Court of Appeals for the District of Columbia Circuit (Case No. 9840). The Court of Appeals in its opinion filed May 31, 1949 said that the Board of Tax Appeals was justified in holding that Citizens was taxable under Sec. 47-1703 as an incorporated savings bank and affirmed the Board's decision. (R. 483.)

SUMMARY OF ARGUMENT.

No question of importance to the public or of general interest is involved in this case and for that reason alone certiorari should be denied. Although Petitioner has asserted that a Constitutional question is present, that question, if it exists at all, was raised by the Court below not in this case but in the case of the Hamilton National Bank.

The decision of the Court of Appeals in this case is sound, as the evidence showed conclusively that Respondent The Citizens Bank of Washington was in fact an incorporated savings bank paying interest to its depositors. It is not true, as urged by Petitioner, that a proper consideration of the case of *District of Columbia* v. *Hamilton National Bank*, No. 385, October Term, 1949, is inseparable from the consideration of this case. Nevertheless, the decision of the Court of Appeals is likewise sound in the *Hamilton National Bank* case, and that case presents no question which should be reviewed by this Court. Certiorari should be denied in both cases.

ARGUMENT.

I.

The Question Involved in this Case is Not of Importance to the Public Nor of General Interest.

Petitioner's brief argues only one point, namely, that the question presented is important. Admittedly, the question is important to the Petitioner and to the Respondents, but that is not a valid ground for certiorari. No matter how important the question may be to the parties to this litigation, it is not of general importance because it has to do only with the construction and the application of a purely local statute for the taxation of banks engaged in business in the District of Columbia. No Federal question of substance, involving the construction or application of the constitution or of a Federal statute of general applicability, is involved in this case, or even in the allegedly related case of *District of Columbia* v. *Hamilton National Bank*, No. 385, October Term, 1949 in this Court, for reasons which we shall hereinafter set forth. (*post*, pp. 13-14.)

Some years ago the United States Court of Appeals for the District of Columbia Circuit decided another case involving the same statute which is involved in the instant case. Although the question in that case was different from

that here involved, the question was one of great importance to the District of Columbia as well as to all of the local banks. Nevertheless, this Court refused to allow certiorari. *District of Columbia* v. *Riggs National Bank*, 58 App. D. C. 349, 30 F. 2d 873, decided February 4, 1929; cert. den. 279 U. S. 846, 49 S. Ct. 343. The question in the present case is of no greater public interest, and the petition for certiorari should be denied in conformity with the uniform rule established by this Court in the decision of many cases.

II.

None of the Reasons Relied on by Petitioner for Allowance of the Writ is Valid.

The Petition for Certiorari in this case assigns four reasons relied on for allowance of the writ. These reasons, briefly summarized, are (1) that the Court below decided a question of substance relating to the construction and application of statutes enacted by the Congress and the application of the Constitution of the United States, and that these matters have not been, and should be, settled by this Court; (2) that the Court below disposed of eight cases in one opinion and in its opinion did not give proper effect to the decisions of this Court with respect to the legislative power of Congress; (3) that the question presented is applicable to determining the constitutionality of every statute enacted by Congress in the exercise of its exclusive jurisdiction to legislate for the District of Columbia; and (4) that the question is one of general importance.

One of the four reasons advanced by Petitioner has been considered and answered under Point I above. There is no need to repeat that discussion under this Point, where the remaining reasons assigned by Petitioner in asking for the writ are considered.

Manifestly, the fact that the Court below disposed of eight cases in one opinion is no ground for certiorari. Petitioner's brief fails to disclose any decisions of this Court as to which the Court below failed to give proper effect

with respect to the legislative power of Congress. Only five decisions of this Court have been referred to in Petitioner's brief. One of those decisions is *Helvering* v. *Lerner Stores Corporation,* 314 U. S. 463, which is cited by Petitioner apparently in support of the proposition that there is no "equal protection of the laws" express or implied in the Fifth Amendment. (See Petitioner's Brief, p. 17, note 7.) Whether or not "equal protection of the laws" is express or implied in the Fifth Amendment has nothing whatever to do with the decisions of the Board of Tax Appeals and the Court of Appeals that this Respondent, The Citizens Bank of Washington, was upon the evidence developed by the record an incorporated savings bank paying interest to its depositors within the meaning of the taxing statute as consistently construed by the administrative authorities of the District of Columbia for a period of more than forty years. (R. 481.) The reference by the Court of Appeals to the requirements of the Fifth Amendment related exclusively to the case of the Hamilton National Bank.

The only other decisions of this Court referred to in Petitioner's brief are *Frost* v. *Wenie,* 157 U. S. 46; *United States* v. *Henderson,* 78 U. S. (11 Wall.) 652; *Wilmot* v. *Mudge,* 103 U. S. (13 Otto) 217; and *Wood* v. *United States,* 41 U. S. (16 Pet.) 342, all of which are cited apparently in support of the proposition that repeals by implication are not favored, and that a general statute, without negative words, will not repeal particular provisions of a former statute, unless the two acts are irreconcilably inconsistent. (See Petitioner's brief, p. 19, note 8.) Nobody can have any quarrel with such elementary principles, but they simply do not have any application to this case. They have absolutely nothing whatever to do with the decisions of the Board and of the Court below that upon the facts of this case this Respondent, The Citizens Bank of Washington, was an incorporated savings bank paying interest to its depositors and should be taxed accordingly.

Nowhere in Petitioner's brief is the soundness and validity of the decision of the Court below seriously attacked insofar as the decision relates to this Respondent and to the six other Respondents in this case. In the Petition in this case at page 8, Petitioner frankly states that Petitioner's principal complaint with the opinion of the Court of Appeals is that the effect of that opinion is to repeal Sec. 47-1701, D. C. Code, 1940 ed. under the provisions of which Petitioner and the Board of Tax Appeals taxed the Hamilton National Bank. (*District of Columbia* v. *Hamilton National Bank*, No. 385, October Term, 1949, in this Court) As will be shown hereinafter under another point (*post*, p. 14), Petitioner's complaint is groundless. However, even if the effect of the decision of the Court of Appeals were to repeal Sec. 47-1701 that would not in any way affect the soundness and the justice of the Court's decision that the Respondent and the six other Respondents in this case were incorporated savings banks paying interest to their customers and taxable accordingly.

The remaining reasons relied on by Petitioner for allowance of the writ are (1) that a substantial Constitutional question is involved, and (2) that a Constitutional question is presented applicable with respect to every statute enacted by Congress in the exercise of its exclusive jurisdiction to legislate for the District of Columbia. Any Constitutional question, if it exists at all, was raised only in reference to the case of the Hamilton National Bank. The only question presented in *this* case is whether this Respondent, The Citizens Bank of Washington, and the six other Respondents in *this* case in the light of the facts developed by the record were incorporated savings banks paying interest to their depositors and taxable accordingly.

III.

The Opinion of the Court of Appeals in this Case is Sound and Right.

As pointed out by the Court of Appeals in its opinion filed May 31, 1949 (R. 478), for many years the taxing authorities of the District of Columbia consistently classified certain banks other than national banks doing business in the District of Columbia as "incorporated savings banks paying interest to their depositors" under the second paragraph of Sec. 47-1703, D. C. Code, 1940 Ed., and collected taxes from them under the more favorable rate prescribed therein. The taxing authorities had been equally consistent in classifying all national banks doing business in the District of Columbia for taxation under Sec. 47-1701, D. C. Code, 1940 Ed., and in imposing upon them the higher rate and less favorable treatment prescribed by that section *irrespective of whether such national banks maintained savings departments and paid interest to depositors having savings accounts with them.* The Hamilton National Bank, being a national bank engaged in business in the District of Columbia with substantial savings accounts upon which it paid interest to its depositors, filed a petition with the Board of Tax Appeals for the District of Columbia for a reduction of gross earnings taxes assessed against it on the ground that the Assessor had refused to permit it to deduct fom its gross earnings a large sum paid as interest to its savings depositors before applying to its gross earnings the tax rate fixed by Sec. 47-1701. The Board of Tax Appeals affirmed the Assessor, whereupon a petition for review was filed with the United States Court of Appeals for the District of Columbia Circuit. In deciding that case, *Hamilton National Bank* v. *District of Columbia*, 81 U. S. App. D. C. 200, 156 F. 2d 843, decided June 28, 1946, the Court of Appeals simply held that the ascertainment of whether a bank was a national bank or other than a national bank was not a proper method of determining whether the bank was or was not an incorporated savings

bank since, as far as savings deposits were concerned, there was no difference between national banks and state banks. The Court said that an administrative officer could not restrict a statutory term such as "incorporated savings bank" by a definition having no relation to savings deposits or accounts and could not eliminate, by administrative definition, from the statutory provision for institutions identical in all respects related to savings deposits with institutions included in his definition, and that any attempt to do so was invalid and not in harmony with the statute. The Court pointed out that historically there was no incongruity in the District of Columbia between a savings bank and a national bank. The Court reversed the decision of the Board of Tax Appeals and remanded the case with instructions to cancel the assessment unless the Assessor upon a re-examination of the entire subject of taxing banks removed the discriminations then existing.

It was not until after the decision by the Court of Appeals in the Hamilton National Bank case decided June 28, 1946, that any attempt was made by the taxing authorities to tax the Respondent The Citizens National Bank of Washington and the six other Respondents in this case other than as savings banks subject to tax under the second paragraph of Sec. 47-1703. On October 17, 1946, the taxing authorities of the District of Columbia rejected the returns made by this Respondent and the other Respondents in this case for the tax fiscal year 1945, and on that date the Assessor made additional assessments of gross earnings against all these Respondents based upon computation of tax at the rate of 6% without any deduction for interest paid to savings depositors. (R. 4-5.) From the assessment so made appeals were taken to the Board of Tax Appeals for the District of Columbia by Respondent The Citizens Bank of Washington and by the six other Respondents in this case. Those appeals had their culmination in the decision of the Court of Appeals which the petitioner now seeks to have reviewed by certiorari.

The printed record of almost five hundred pages in this case shows that a very thorough presentation was made to the Board of Tax Appeals for the District of Columbia. An exhaustive study and presentation was made of the legislative history of the statute involved and of its administrative interpretation over a period of more than forty years. Not only was the general factual background developed in the greatest detail, but the facts as to the nature of the business and operations of each individual bank were developed very fully by the evidence presented to the Board of Tax Appeals, which filed comprehensive and carefully prepared Findings of Fact and Conclusions of Law, and in addition thereto filed also a Memorandum (R. 22-26). The Memorandum of the Board of Tax Appeals summarizes (R. 24-26) the Board's reasons for holding that The Citizens Bank of Washington and the other six Respondents in this case were savings banks within the meaning of the second paragraph of Sec. 47-1703, D. C. Code, 1940 Ed. The salient facts found by the Board of Tax Appeals which justified its holding that this Respondent, The Citizens Bank of Washington, was an incorporated savings bank are set forth with appropriate record references in the Statement of the Case in this brief (*ante*, p. 3), and are not repeated here. The Board of Tax Appeals found also that facts in the cases of each of the other six Respondents entitled them also to be classed as incorporated savings banks within the meaning of the taxing statute.

At page 17 of the Petitioner's Brief, it is asserted that on the basis of the business done by them, the Respondents in this case do not come within the traditional meaning of the term "incorporated savings bank". However, the issue in this case was not whether the Respondents were incorporated savings banks within the *traditional* meaning of the term. The one and only issue in the case as it reached the Court of Appeals was whether these Respondents were incorporated savings banks paying interest to their depositors within the meaning of the second paragraph of Sec. 47-1703. On this issue, the Board of Tax Appeals decided

that, in the light of the legislative history of the statute and in the light also of its consistent interpretation by the governmental agency charged with the administration of the statute, these Respondents were properly taxable as incorporated savings banks, and the Court of Appeals affirmed the Board's decisions as to these Respondents.

Petitioner's position before the Court of Appeals was that there was no longer any bank or trust company in the District of Columbia properly classifiable as "an incorporated savings bank paying interest to its depositors". The Court of Appeals pointed out that this position would be correct only if a savings bank be thought of in the *traditional* sense of the term as an institution which *confines* its business to interest bearing savings department. The Court of Appeals then went on to point out also that in the light of the legislative history of the statute it was not true that Congress intended so to restrict the term, and that on the other hand there was clearly indicated a legislative intent not to apply the second paragraph of Sec. 47-1703 to *traditional* savings banks because there were no such savings banks in the District of Columbia when that section of the statute was enacted in 1904 and also because the banks at whose instance the statute was adopted were engaged in commercial banking as well as in receiving savings deposits. The Court of Appeals held that the administrative interpretation of the second paragraph of Sec. 47-1703 as applicable to commercial banks with substantial savings departments was to be given great weight. The decision of the Court of Appeals that this Respondent, The Citizens Bank of Washington, and the six other Respondents, were taxable under the second paragraph of Sec. 47-1703, is fully justified by the careful and logical statement of reasons set forth in the opinion of the Court. Consequently, there is not the slightest reason for reviewing that decision.

IV.

This Case is Not Inseparably Related to the Hamilton National Bank Case.

Petitioner has asserted that the consideration of this case is inseparable from a proper consideration of the case of the *District of Columbia* v. *Hamilton National Bank,* No. 385, October Term, 1949, and that, if for any reason the case of the Hamilton National Bank should be reviewed, then this case necessarily must be reviewed also. Petitioner is wrong. The two cases are not inseparable.

Whether the Hamilton National Bank is or is not entitled to be taxed as an incorporated savings bank within the meaning of the second paragraph of Sec. 47-1703 has no bearing whatever upon the classification of Citizens as coming within the provisions of that Section. The change of position by the taxing authorities of the District of Columbia following the case of *Hamilton National Bank* v. *District of Columbia*, 81 U. S. App. 200, 156 F. 2d 843, has been nothing more than a tactical maneuver on the part of the District in an endeavor to sustain a disputed assessment upon the Hamilton National Bank to the point where that bank could no longer claim discrimination. This was in effect admitted by one of Petitioner's witnesses at the hearing before the Board of Tax Appeals. This witness, who was a member of the Board of Appraisers, testified that the change of position resulting in the attempt to tax Citizens and certain other non-national banks at the higher rate under Section 47-1701 would not have been attempted for the fiscal year in question if it had not been thought necessary in order to remove the discrimination which the Court of Appeals found to be present. (R. 179.) In ordinary circumstances, therefore, this case would never have been provoked by Petitioner, much less appealed and attempted to be brought to this Court for review.

Nowhere in the Petition for Certiorari or in Petitioner's brief does Petitioner argue directly that the decision insofar as it affected Citizens and the other Respondents in this case was either inherently or basically wrong. Indeed, the only reason suggested by Petitioner for reviewing the case involving Citizens is that the discrimination which the Court of Appeals found existing in the Hamilton National Bank could be eliminated by taxing Citizens and the other Respondents in this case under Sec. 47-1701 despite the utter lack of any change in the statute or in the nature of the business operations of these Respondents which would justify taxing them at the higher rate.

Petitioner has misconstrued the effect of the opinion of the Court of Appeals so far as it relates to the Hamilton National Bank. The Court of Appeals did not decide that Sec. 47-1701 so far as it taxed the gross earnings of banks in the District of Columbia had been repealed either expressly or by implication. All that the Court decided was that in view of the established fact that the Hamilton National Bank had substantial savings accounts on which it paid interest to its depositors, it was entitled to be taxed according to the second paragraph of Section 47-1703 along with non-national banks engaged in the savings bank business. The Court did not strike down Sec. 47-1701 or hold it to be unconstitutional. Any national bank in the District of Columbia not engaged in the savings bank business would be taxable under Sec. 47-1701, as would also any non-national bank in the District of Columbia similarly situated. At the time of the enactment of the taxing statute in question and for many years thereafter national banks did not engage in the savings bank business. The Court of Appeals in the case of the Hamilton National Bank simply held that when that bank engaged in the savings bank business and became in effect also an incorporated savings bank, it was entitled to be taxed as any other incorporated savings bank.

No Constitutional question is really involved in the case of the Hamilton National Bank. The Court of Appeals

simply held that a national bank which was engaged in business in the District of Columbia and which by reason of the nature of its business operations met the statutory definition of an incorporated savings bank was entitled to be taxed accordingly and that an administrative officer could not restrict a statutory term such as "incorporated savings bank" by a definition having no relation to savings deposits or accounts because any attempt to do so would be invalid *as not in harmony with the statute.* The decision was not based upon any application of the Fifth Amendment or of any other Constitutional provision. The Court of Appeals did not find it necessary to invoke any Constitutional provisions. The reference in the Court's opinion to the Fifth Amendment was unnecessary to the decision and is purely dictum. Accordingly, there is no valid reason for reviewing either the Hamilton National Bank case or this case.

CONCLUSION.

It is submitted that this case lacks utterly any showing of grounds for the issuance by this Court of the writ of certiorari. It is clear that the decision of the Court of Appeals is right both in this case and in the case of the Hamilton National Bank and that certiorari should be denied in both cases.

Respectfully submitted,

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Washington, D. C.,
November 23, 1949.